THE FEDERAL REGULATION OF LIFE-INSURANCE.

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WHEN Alexander Hamilton, that Admirable Crichton of our political history, submitted to President Washington, on February 23rd, 1791, his remarkable memorandum on the constitutionality of the proposed National Bank, he took issue with Secretary Jefferson and Attorney-General Lincoln as to the scope of federal power; and in that memorable discussion, distinguished on both sides by remarkable intellectual ability and even more remarkable prescience, the two great schools of constitutional construction in this country had their true birth.

In discussing the question of implied powers, the Attorney-General had attempted to enumerate such as he deemed to be fairly included in the grant to the Federal Government of the express power to regulate commerce; and, in replying to this memorandum, Alexander Hamilton suggested others, and among those, whose existence, he declared, admitted "*of little, if any, question,*" he specified "the regulation of policies of insurance."

To Hamilton and his contemporaries, the regulation of all forms of insurance was a familiar exercise of governmental power. It is true that there were at that time few life-insurance companies in the country. The oldest company in the world, the Equitable, of London, had been founded less than thirty years before, and the growth of the life-insurance idea was so slow that it was not until several decades later that the business began to be what it now assuredly is,—a conspicuously beneficent instrumentality of civilization.

There were, however, at the time of the adoption of the Constitution, a number of fire and marine insurance associations, both

foreign and domestic; and these commercial enterprises had been, in all civilized countries, the subject of governmental supervision, at times repressive and at times fostering. Thus, during Elizabeth's reign, the English Parliament in 1601 so far recognized marine insurance as the handmaid of commerce, and a valued and almost indispensable factor in commercial intercourse, that it provided an arbitration board of "grave and discreet merchants" to adjust controversies between insurer and insured.

Early in the development of insurance, attempts were made to make it a governmental function, and its direct relation to the great ends for which all government was instituted was early recognized. Thus, after the fire of London, in 1666, that city attempted to engage in fire-insurance, but the courts held that such business was beyond its corporate powers. Twenty years later, in a dispute between two existing fire-insurance companies, the right of the Crown to supervise the business and compel contribution by it to the support of the fire department was asserted and recognized.

Life-insurance, however, commended itself less to governmental favor, and this for the obvious reason that, in the earlier stage of its development, it was little better than a wager, as there were no adequate tables of mortality upon which the ascertainment of life expectancy could be scientifically adjusted. It was natural, therefore, that governments should discourage a business in which mere chance was to so large a degree a factor, especially as wagering upon life had in lawless times an obvious tendency to murder and other crimes. Thus, the ordinance of 1570 in the Netherlands, that of 1598 in Holland, that of Sweden in 1661, and that of France in 1681, all forbade wagers upon human life as against public policy. The value of annuities, however, was recognized, and attempts were early made to have them serve the purposes of fiscal administration. Thus, a Neapolitan, Lorenzi Tonti, proposed to Mazarin to issue a public loan in the form of annuities, the last survivor to receive the aggregate annuities upon all the lives of the annuitants; and Louis XIV, in 1689, issued such a joint annuity, which terminated in 1726 with the death of a female annuitant, who at that time had an annual income of over $350,000. The effect of such wagering upon life was so demoralizing that tontine insurance was forbidden in France in 1770.

A century before, John De Witt, Grand Pensioner of Holland, had reported to the States General a plan for the sale of annuities upon a scientific basis, and in 1692 the English Government sold annuities without the tontine feature. In 1786, William Pitt attempted to convert a portion of the public fund into such annuities.

When Hamilton, therefore, included the regulation of policies of insurance within the federal power to regulate commerce, he instanced a power so familiar to all his contemporaries that he could well say that its existence admitted "of little, if any, question"; and I am not aware that, in the subsequent discussion of the constitutional question, either Jefferson or Lincoln took issue with Hamilton as to this particular claim. President Washington sustained Hamilton's theory as to the incorporation of a national bank, and in this the Executive Department was subsequently sustained by the Supreme Court of the United States, in the famous case of McCullough *vs.* Maryland, in which decision Marshall's analytical powers shone so resplendently.

Notwithstanding this claim of power, and the immense growth of insurance during the nineteenth century, and the intimate relation which it obviously bears to commerce, the Federal Government never legislated with reference to insurance, until, in the year 1903, it created the Department of Commerce and Labor. This Department was given power

"to gather, compile, publish and supply useful information concerning corporations doing business within the limits of the United States *as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance.*"

This language fairly implies a declaration by the legislative branch of the Government that insurance may be a part of interstate or foreign commerce. The House Committee on Interstate and Foreign Commerce, to which this bill was referred after it had passed the Senate, recommended an amendment to create a bureau of insurance, "to exercise such control as may be provided by law over every insurance company transacting business in the United States outside of the State, Territory or District wherein the same is organized," giving as their reason the fact that the business of insurance was "essentially a matter of inter-

state business, and hence largely beyond any effectual control by State authorities." The constitutionality of the proposed amendment was challenged in a debate in the House, but it was adopted by a vote of 98 to 81. In conference, the attempt to create a separate bureau was abandoned, and the power of the new Department was restricted to the mere collection of statistics.

At present, two bills for the federal regulation of insurance are pending in Congress, one introduced by Congressman Morrell and the other in the Senate by Senator Dryden, the latter containing a comprehensive scheme for such regulation.

The failure of Congress to legislate with reference to insurance until more than a century after the adoption of the Constitution does not disprove the existence of the power, for the same inaction is to be noted with reference to any Congressional regulations of interstate commerce. The plenary power of Congress over interstate carriers was never exercised until the passage of the Interstate Commerce Law of 1887. The commerce power has been well defined to be the "sleeping giant" of the Constitution; and it is only within a few decades that its true place, as the corner-stone of our federal system, has been appreciated.

Another department of the Federal Government had, however, previously recognized the fact that insurance was essentially commerce. In his annual message of December 2nd, 1895, President Cleveland referred to the "vast business" which American insurance companies had developed in foreign countries; and, after referring to the restrictive legislation in Prussia, he expressed the opinion that we should not "silently acquiesce in vexatious hindrances to enjoyment of our share of the legitimate advantages of proper *trade relations.*"

Our foreign insurance interests, therefore, were classed with our foreign trade; and, during each subsequent administration, the State Department has repeatedly used its good offices to protect the foreign interests of American insurance companies.

It may be noted in passing that the importance of this feature of our trade relations is imperfectly appreciated. On December 31st, 1903, two companies alone (the Equitable and the Mutual Life, of New York,) had 366,725 outstanding contracts of life-insurance in foreign countries, which represented a total liability of $980,055,792, and they received in that year from these policies premiums amounting to $42,027,980.25.

In protecting a commercial interest of this magnitude, the State Department has been embarrassed by the previous failure of Congress to recognize insurance as a matter of federal concern. When, for example, Prussia, in 1895, threatened to exclude American companies from its borders, the insurance departments of certain American States adopted retaliatory measures to exclude German companies. These orders of State superintendents were transmitted through the State Department to the Prussian Government, which naturally paid slight, if any, attention to the action of individual States.

Remarkable as has been the growth of life-insurance in all civilized countries, in none has its progress been so extraordinary as in the United States. Our American companies have, at present, over 17,000,000 contracts of life-insurance outstanding, and their annual premium receipts exceed $500,000,000, and their accumulated assets aggregate $2,000,000,000.

Without awaiting the recognition of Congressional enactment or executive order, insurance, through the agencies of steam and electricity, has nationalized itself. It has overleaped territorial boundaries and outgrown the supervisory power of the individual States, and President Roosevelt, therefore, only recognized an established economic condition rather than a constitutional theory when, in his last message to Congress, he said:

"The business of insurance vitally affects a great mass of the people of the United States, *and is national and not local in its application.* It involves a multitude of transactions among the people of the different States, and between American companies and foreign governments. I urge that the Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance."

More recently, in discussing the unhappy difficulties in the Equitable Life Insurance Company, which have so strongly emphasized the necessity of a single supervisory power, the President again said forcibly, although unofficially:

"It seems to me that what has occurred to the Equitable Life furnishes another argument for effective supervision by the National Government, if such supervision can be obtained, over all these great insurance corporations which do an interstate business."

There are peculiar reasons why insurance should be submitted to strict governmental supervision. Its success depends

upon a multiplicity of contracts in order to establish a safe average, and even when conducted on the mutual plan, as distinguished from a joint stock company, such multiplicity (in the case of the Mutual Life Insurance Company, of New York, over 600,000 policy-holders) necessarily makes it impossible for the policy-holders to exercise any but an indirect control over the affairs of the company. Moreover, many of the contracts are conditioned upon the death of one of the contracting parties, and it is eminently proper that the State should supervise the faithful execution of the contract by the surviving party. The business requires such special knowledge that few, if any, have the training necessary to conduct it wisely. The expectancy of life must be determined scientifically. The earning power of money must be determined in advance by able economists. The investment of enormous accumulations of assets requires financial skill and experience of the highest order. The intricate mathematical calculations require exceptional actuarial skill. An infinitesimal fractional variance in such calculations may mark the difference between a sound proposition and an illusory scheme. The collapse of so many fraternal assessment societies shows the danger to the public of unregulated insurance; and, as the public can have neither the knowledge nor the aptitude to solve for itself these intricate questions, reasonable governmental supervision is not only desirable but imperative. Almost every civilized country has appreciated this necessity, and, in almost all, the insurance department is a bureau of the Department of Commerce.

Little need be added to the able article in the last number of this REVIEW, by Mr. S. Herbert Wolfe, on the folly of the division of authority. If it be a truism that "no man can serve two masters," it is also true that no insurance company can satisfactorily serve fifty-one. No legitimate commercial enterprise can be properly conducted which depends for its very existence, as well as its method of operation, upon the caprice of an official. Under the present system, insurance companies can obtain their right to do business, in a State other than that of their origin, only upon such terms, however capricious and arbitrary, as that State may direct; and, what is more mischievous, their right, when once admitted to do business and to fulfil solemn and continuing obligations, exists only by sufferance, and is liable to immediate destruction by the mere whim of a State official.

The evil of conflicting commercial regulations, which led to the adoption of the Constitution by the colonies, still exists in the matter of insurance, for individual States have vied with each other in passing restrictive, discriminative and retaliatory legislation against the insurance corporations of other States.

The United States is the only government in which such power is decentralized and permitted to remain in a constituent State. Prior to 1901, the various German States regulated insurance within their respective borders; but, by the Imperial Statute of May 12th, 1901, the entire supervision of private insurance companies was vested in the so-called Imperial Supervising Office.

It is noteworthy that, in the last important attempt to draft a constitution for a federated republic, the power over interstate insurance transactions was vested in the central government; for the Commonwealth of Australia, by the Constitution of 1898, vests in Parliament the power "to make laws for the peace, order and good government of the Commonwealth," and in enumerating these, the article includes: "14. Insurance other than State insurance, also State insurance extending beyond the limits of the State concerned."

In France, the entire subject of governmental supervision was exhaustively considered by the Chamber of Deputies in the session of 1903, and a law was passed which vested such supervision in a bureau of the Ministry of Commerce.

Uniformity of contract in a given class of insurance is a basic principle of the business, but many States attempt by legislation, often injudicious, to read into insurance contracts statutory provisions which, applying only to contracts in a particular State, are destructive of uniformity.

The visitorial power of State departments has likewise been at times the subject of the gravest abuses. The expense of such examinations too often rests in the discretion of the visiting superintendents. While, like Warren Hastings, they may marvel at their own moderation, the burden to the company of these examinations by insurance departments of over fifty States and Territories is excessive. While many States have admirable insurance departments, against whose conduct no just complaint can be made, yet in others, arbitrary power over foreign companies has at times degenerated, as arbitrary power is apt to do, into impudent demands that are little better than official blackmail.

The burden of expense has, in many instances, exceeded all legitimate bounds. In the year 1902, twenty-eight States received from insurance companies, exclusive of property taxes, over $5,000,000 in excess of the cost of such supervision. One single State is said to have collected more than the Federal Government requires to examine all the national banks in the country; and this unnecessary burden, aggregating each year $10,000,000, ultimately falls upon the policy-holder and is imposed not upon a money-*making*, but a money-*saving*, enterprise, whose lofty purposes and beneficent results ought to relieve it of any form of license taxation. A tax upon the moral obligation of insurance is little better than a tax on morality. It burdens the policy-holder in the recognition of a moral duty to safeguard those dependent upon him from the injurious consequences of his death. It is certainly a tax on thrift. The arbitrary expenses of inquisitorial examinations, which too often rest, as to amount, in the discretion of an insurance superintendent, is a form of Turkish satrapy which is utterly at variance with the spirit of our institutions. For nearly half a century the insurance companies have vainly protested against the intolerable burden of such vassalage to many masters, and they naturally welcome the declaration of President Roosevelt that the time has come for the Federal Government to assume the duty of supervising this important and beneficent instrumentality of modern life.

The difficulty is a legal rather than an economic one. Few reasonable men differ with respect to the advantage of having one central supervising authority, rather than many; and the federal regulation of insurance would have come to pass many years ago but for the decision of the Supreme Court in the case of Paul *vs.* Virginia, in the year 1868. The validity of a State statute, requiring foreign insurance companies to obtain a license as a prerequisite to business, was there in question, and its constitutionality was challenged on the ground that such an act was inconsistent with the federal powers to regulate commerce. The Court, speaking by Mr. Justice Field, held that

"Issuing a policy of insurance is not a transaction of commerce. . . . These contracts are not articles of commerce in any proper meaning of the word. . . . Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent of Vir-

ginia. They are then legal transactions and are governed by the local law."

This decision excited widespread interest, and has been freely criticised for many years by leading constitutional lawyers; but, as recently as the year 1901, in the case of Nutting *vs.* Massachusetts, the Court reaffirmed the doctrine, but in somewhat more guarded language, for Mr. Justice Gray, speaking for it, said:

"A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or otherwise, within its limits, except upon such conditions as the State may prescribe, *not interfering with interstate commerce.*"

Apparently, Mr. Justice Gray, who weighed his words with exceptional care, contemplated the possibility that, in some phases, interstate insurance transactions might be a part of interstate commerce, and therefore beyond the power of the State to injure or destroy; but, unfortunately, he failed to explain the meaning of his qualification.

A more successful attempt to impair its authority was made, a year later, in the so-called Lottery Cases, which were argued three times, and not finally decided until February, 1903. The Supreme Court had under consideration the constitutionality of a Federal Statute, which forbade the transfer by interstate carriers of a lottery ticket from State to State, and it was insistently claimed that as, under the authority of Paul *vs.* Virginia, an insurance policy was not an article of commerce, a lottery ticket, also an aleatory contract, could not be such an article of commerce. Apparently, there was no logical distinction between the two; for, if a lottery ticket, forbidden by the police laws of nearly every State, and which only promises to pay upon the remote contingency of a successful drawing, can be an article of commerce, then a contract of insurance, which promises to pay upon a contingency which must surely happen, must *a fortiori* be a subject of commerce.

By a vote of five to four, the Supreme Court finally sustained the validity of the federal act, and distinctly held that a lottery ticket was an article of commerce. It is significant that, although the opinion of the minority justices referred at length to Paul *vs.* Virginia, and subsequent cases, as inconsistent with the decision of the Court, the opinion of the majority made no attempt to suggest a logical distinction between a policy of insur-

ance and a lottery ticket; and it may be fairly contended, therefore, until the Supreme Court declares otherwise, that the Lottery Cases have overruled Paul *vs.* Virginia, at least to the extent that the former case held that a policy of insurance could not be a subject of commerce.

Paul *vs.* Virginia, however, was also decided on the ground that, when an agent of a foreign insurance corporation delivers to a citizen of an admitting State a policy of insurance, such transaction is local and not interstate; but insurance companies could subject themselves to federal authority in this respect by making a direct delivery from the home office to the insured in another State. The destructive effect of Paul *vs.* Virginia upon federal supervision was caused by the sweeping declaration that a policy of insurance could not be a subject of commerce, and not by the dictum as to the place of delivery.

If it be permitted in the great court of public opinion to criticise the reasoning of the Supreme Court—and, as Homer nodded, so our great tribunal has on more than one occasion deliberately confessed its own fallibility by reversing a decision to which it had adhered for more than a generation—then I submit that the Supreme court, in Paul *vs.* Virginia, placed an exaggerated estimate upon the mere delivery of a policy, as the essential act of an insurance transaction. Undoubtedly, such delivery may mark the commencement of the contractual obligation thereby assumed, but the policy merely evidences the transaction of insurance, which, conceivably, could take place without either contract or delivery. For the purpose of federal power, insurance should be regarded, not as the mere delivery of a policy, but as the reciprocal transfer of money and credits from insurer to insured. Each year, more than $500,000,000 passes from State to State in fulfilling the contract of insurance, a form of commercial intercourse which surpasses in magnitude all of the interstate and foreign commerce of any kind that existed in the United States at the time of the adoption of the Constitution. A contract to exchange a ton of coal for money may not be commerce, but the actual exchange is; and, by parity of reasoning, a contract to pay a sum of money for indemnity, in consideration of an ultimate return, whether certain or contingent, of another sum of money, may not be commerce, but the actual exchange of reciprocal pecuniary benefits would seem to be as much commerce as the exchange of

any other commodity. The Supreme Court, however, had apparently thought otherwise.

The Supreme Court has never had occasion to consider the validity of a federal statute to regulate insurance. All previous decisions were predicated upon State statutes; and, if the Dryden bill should become a law, and its validity be questioned, the Supreme Court will be assisted in recognizing federal authority, not only by its more recent decision in the Lottery Cases, but also by the fact that, since their decision in Paul *vs.* Virginia, Congress and the Executive Department have recognized by legislation and Executive declaration the federal nature of insurance. Unquestionably, neither Congress nor the Executive can enlarge the constitutional domain of government by a mere declaration, but the Supreme Court has repeatedly held that it will pay great respect to any declaration of coordinate branches of the Government as to what is an article of commerce.

No attempt, moreover, has been made to sustain a federal insurance law under any other express clause of the Constitution. The national banks are private enterprises, and are connected with the federal fiscal system by a very slender thread, and yet their constitutionality has been sustained. I think it would be possible to draft a law which would require insurance companies to serve the fiscal purposes of the government to such an extent as would bring them within the scope of federal power. Insurance is but a form of cooperative banking, and by enlarging its purposes the end referred to might be attained.

If, however, Congress is without present power under the Constitution, then the serious question presents itself whether the evil to be remedied is not of sufficient magnitude to justify a constitutional amendment. Personally, I think it is. Conditions have arisen of which the framers of the Constitution had no conception whatever. An amendment should be passed, if necessary, to regulate insurance, the importance of which can be measured by the fact that, as an institution, it collects more money each year than the Government itself, disburses more than the receipts of all the custom-houses, and administers an accumulated treasure greater than all the money now in circulation in this country or the entire capital of our national banks.

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